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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 988

JOSEPH BEASLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-4a) is reported at 327 F.2d 566.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1964. By order of Mr. Justice White, the time for filing a petition for a writ of certiorari was extended to and including April 10,

1964. The petition for certiorari was filed on April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was plain error in the trial court's instructions concerning the statute of limitations.

2. Whether there was plain error in the admission of expert testimony on a question of legal title.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of conspiracy to use the mails to defraud and of nine substantive offenses (18 U.S.C. 371, 1341). He was sentenced to concurrent terms of imprisonment for five years (R. 2-9). The court of appeals affirmed. The evidence may be summarized as follows:

Petitioner induced a number of people to invest sums ranging up to $2,000 in a mining claim which he had in New Mexico. He wrote various letters making extravagant statements as to the value of the uranium ore purportedly covered by the claim and asking for more money (R. 24-57, 78-95). It was shown at trial that the chance of discovering uranium in the area covered by the claim was "extremely slight" (R. 17). An attorney specializing in mining titles testified to his opinion that petitioner had no merchantable title to the mining claim (R. 72). This

testimony was based on the facts that approximately six other people had filed earlier claims to the same property and that a suit to quiet title brought by petitioner in August 1957 had been dismissed by the court for want of prosecution. The attorney testified that he had written an opinion letter in January 1957 in which he had stated that petitioner's claim followed several others (R. 68-69). No objection was made to any of the attorney's testimony (R. 68-74). At the conclusion of the government's case, petitioner moved for dismissal, saying (R. 100):

> The proof shows that the money was paid before any of the letters, introduced in evidence, or other items were sent through the mails, in each case, or I would say in most of the cases, the money and the letters were over five years beyond the date of this indictment, which unfortunately I do not have before me, but I understand it was in the latter part of April of 1962.

The assistant United States attorney explained (R. 101):

> Yes, your Honor, counsel is correctly stating that as to some of the counts all the money which was paid by the investors was paid in before the letters, which are set up in the indictment. As to those, we contend they came under the Lulling Letter Rule. * * * There are four of those. The remainder of the letters set up in the indictment were mailed out within the statute of limitations and before all the money had been paid over to the defendant.

The various letters upon which the substantive counts were based were mailed in 1957 on April 16

(counts 2 and 3), August 3 (count 4), August 4 (counts 5 and 6), August 17 (counts 7 and 8) and September 25 (counts 9 and 10). The indictment was returned on April 12, 1962 (R. 2-8). The court instructed the jury as to the statute of limitations (R. 130-131):

> These dates in there are important and pertinent in this case because under the law under which Dr. Beasley is being prosecuted the offenses must have been committed within 5 years of these dates. The dates are important because if these dates exceed 5 years from the date of this Grand Jury indictment, which was returned on April 2nd, 1962, anything that occurred more than 5 years before that, as to the dates of these specific mailings would be out because of the statute of limitations. You will remember the testimony in that respect. It is important you remember this evidence as it relates to each count because you must find the defendant guilty or not guilty on each of the ten counts in the indictment.

At the conclusion of the charge there was a colloquy out of the hearing of the jury, which was not reported, following which the court gave this supplemental instruction (R. 135):

> Ladies and Gentlemen of the Jury, in connection with my previous instructions on the statute of limitations, I further instruct you that as to each count, if the letters were mailed at any time after April 16, 1957, then such count is within the statute of limitations, and if all the elements of such count, including the date of mailing, have

> been proved to your satisfaction and beyond a reasonable doubt, then you would be warranted in convicting the defendant on such count, otherwise, you should acquit him of said count.

Petitioner did not except to either the original charge or the supplemental instruction (R. 135).

ARGUMENT

1. The record presents no issue as to the statute of limitations because the letters themselves establish that they were mailed within the statutory period. The court's original instructions were apparently based on a misapprehension as to the date when the indictment was returned, since the actual date was April 12, 1962, and not April 2. The court's subsequent clarification was obviously intended to correct this error—which was to petitioner's detriment since it moved the limitations period back by ten days. In any event, the added instruction expressly authorized a guilty verdict only "if *all* the elements" of the offense had been proved. (Emphasis added.)

If petitioner's contention is that the letters were not in execution of the fraudulent scheme because the victims had previously paid him money, that contention is answered by *United States* v. *Sampson*, 371 U.S. 75, 78-81. Petitioner was still seeking to obtain additional money from his victims, and was further reassuring them that the promised plans for development of the claim would be carried through.

2. No error was committed by the court in permitting the attorney testifying to the detective nature

of petitioner's title to express an opinion as of the date of trial. Implicit in his answer was the view that at all previous times petitioner's title was defective because of the existence of prior claims, and he in fact testified that these claims had been filed "prior to" January 1957 (R. 71). Petitioner's abandonment of his suit to quiet title substantiated the opinion of the government witness that petitioner held no merchantable title, an opinion which was not challenged or contradicted at trial and which had been expressed by the witness as early as January 1957.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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